Boyer Ford Trucks, Inc. *and* **Professional Truck Salespersons Association.** Case 18-CA-6508

12 June 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 14 April 1983 Administrative Law Judge Mary Ellen R. Benard issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions as modified herein, and to adopt the recommended Order as modified.

The judge found that Joseph E. Chesla is entitled to car and gasoline allowances which he would have received had he remained in the Respondent's employ. Thus, she included in his backpay $3950 as a car allowance, and $1250 as a gasoline allowance, for the time periods covered by the backpay specification. The judge included these amounts because she concluded that both allowances were perquisites of employment,[2] rather that reimbursements for job-related expenses. The Respondent excepts to the judge's conclusion that these allowances are compensable as perquisites of Chesla's employment. We find merit to the Respondent's exception with respect to these allowances.

Philip Maas, the Respondent's president, testified that the Respondent provided each salesman with a vehicle or else it provided an allowance[3] to reimburse the salesman for expenses of operating his own car while calling on customers to try to sell the Respondent's trucks. Maas stated that, while the Respondent required no mileage verification or vouchers of business usage from the salesperson in order for him to receive the car allowance, the Respondent's management "at all times was monitoring the calling that the salesman was out doing and the accounts they were calling on and the meetings they were having." Likewise, with respect to a $50-per-month gasoline allowance which the salesmen received, the Respondent did not require verification of how much of the gasoline was used in making business calls, but did require receipts showing $50 of gasoline purchases in order to receive the full monthly allowance.

Because the judge found that there was apparently no restriction on the salesmen that they use their cars or buy gasoline only for business purposes, and no evidence that the Respondent attempted to ascertain the amount salesmen used their cars in the course of business, she concluded that the allowances were perquisites of employment. We cannot agree that the fact that the Respondent gave the allowance without requiring detailed proof each month of all business use renders the allowances perquisites rather than reimbursements. The salesmen needed automobiles in order to perform their job functions, and Maas testified without contradiction that the salesmen's activities were monitored by the Respondent. The Respondent may well have found it more administratively convenient and/or economical simply to give what it estimated as reasonable allowances than to go through the detailed paperwork of requiring and assessing proof of exact business usage each month.

We therefore find, contrary to the judge, that the Respondent's automobile and gasoline allowances are reimbursements for job-related expenses which Chesla did not have when not employed by the Respondent.[4] Accordingly, we shall modify the judge's recommended Order by deducting those allowances from Chesla's recommended backpay.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Boyer Ford Trucks, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall satisfy its obligation to make whole Joseph E. Chesla through 31 December 1981 by the payment of the amount of $80,385 as

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The judge noted that the Board has found demonstrator automobiles to be compensable items in backpay proceedings, where the cars are furnished as a perquisite of employment and not as a selling tool. *Folk Chevrolet*, 176 NLRB 277 (1969), and other cases cited at fn. 19 of her decision.

[3] The allowance, according to Maas, varied at different times between $150 and $250 per month, and the Respondent at the time of the hearing was not paying anything for a car allowance.

[4] Member Zimmerman, unlike his colleagues, would adopt the judge's inclusion of car and gasoline allowances in backpay. Here, the Respondent's president, Philip Maas, testified that the Respondent paid the monthly car allowance with the submission of a voucher no matter how much or how little he used the car in that particular month. Likewise, with respect to the $50 gasoline payment, Maas testified that the Respondent required gas receipts for up to $50, but did not require the salesperson to submit mileage claims and had no method of verifying how many miles a salesperson put on a car during the month. Under these circumstances, Member Zimmerman agrees with the judge that the allowances are perquisites of employment, rather than expense reimbursements, and should be included in backpay.

[5] Thus, we have deducted $3950 of car allowances, and $1250 of gasoline allowances, from the $85,585 of total backpay recommended by the judge.

net backpay. The foregoing amount shall be paid plus interest thereon accrued to the date of payment, computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977),[6] minus any tax withholding required by Federal or state laws.

[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARY ELLEN R. BENARD, Administrative Law Judge. On March 13, 1981, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding in which it directed Boyer Ford Trucks, Inc., herein called Respondent, its officers, agents, successors, and assigns, to, inter alia, offer reinstatement to and make whole employee Joseph E. Chesla[2] for any loss of pay resulting from Respondent's discrimination against him. The Board's Decision and Order was enforced by a consent judgment of the United States Court of Appeals for the Eighth Circuit dated August 26, 1981.

A controversy having arisen over the amount of backpay due to Chesla, the Regional Director for Region 18 of the Board, on March 22, 1982, issued and duly served on Respondent a backpay specification and notice of hearing, setting forth the amount of backpay allegedly due under the Board's Order. Respondent filed an answer dated March 30, 1982, admitting certain allegations of the specification and denying others.

A hearing was held before me in Minneapolis, Minnesota, on September 28, 1982. Following the hearing, the General Counsel and Respondent filed briefs, which have been considered.

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS AND CONCLUSIONS

I. BACKGROUND; THE ISSUES

Respondent is a retail and wholesale truck dealer located in Minneapolis, Minnesota. Prior to his discharge on November 26, 1979, discriminatee Joseph E. Chesla had worked for Respondent as a commission salesman for 8 years. It is essentially undisputed that Chesla was primarily a fleet salesman, i.e., he maintained a continuing business relationship with his customers and sold each of his customers anywhere from 10 to 80 trucks per year, as opposed to retail salesmen who serviced customers who purchased perhaps 1 or 2 trucks or salesmen who primarily sold used trucks. However, as discussed below, there is some dispute as to whether Chesla refused to make any but fleet sales and, assuming such a refusal, whether, in light of various factors, Chesla would have continued to refuse to make any but fleet sales had he not been discharged.

The primary issues, as framed by the specification, the answer, and at the hearing,[3] are (1) whether statements made by then counsel for Respondent at the unfair labor practice hearing constituted a valid offer of reinstatement to Chesla; (2) whether the formula used by the General Counsel to determine Chesla's gross backpay is appropriate; (3) whether Chesla is entitled to the car and gasoline allowances he would have received had he remained in Respondent's employ; (4) the amount of pension and profit-sharing contributions which Chesla should be awarded; (5) whether Chesla should receive any backpay for the fourth calendar quarter of 1979;[4] (6) whether certain payments made to Chesla by Respondent following his discharge should be considered as interim earnings; and (7) whether certain "chargebacks" from sales made

[1] 254 NLRB 1389.

[2] Apparently through inadvertence, the notice appended to the Board's Decision mistakenly referred to Chesla as "James E. Chesla."

[3] The answer does not contain any figures or computations, but generally denies the appropriateness of the formula used in the backpay specification and sets forth the premises underlying the formulas which Respondent contends should have been used. However, the General Counsel did not allege that the answer failed to meet the requirements set forth in the Board's rules and regulations for answers to backpay specifications. Specifically, Sec. 102.54 of the Board's Rules and Regulations provides, in pertinent part:

> (b) . . . The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

The General Counsel did not allege at the hearing that the answer was inadequate or that any of the allegations in the answer should be stricken. Consequently, I consider it appropriate to treat the answer as putting all matters it raised, including the appropriateness of the formula used to compute backpay, in issue. At the hearing, Respondent offered into evidence exhibits showing alternative computations based on the formulas it had alleged in the answer were more appropriate than that used in the backpay specification. The General Counsel objected to the admission into evidence of these exhibits on grounds that the computation should have appeared in the answer. However, inasmuch as there was no contention prior to the offer of these exhibits that the answer did not properly put the appropriateness of the backpay formula into issue, I admitted the exhibits into evidence as showing the consequences of using the formulas proposed by Respondent. I adhere to that ruling.

[4] Respondent raised this issue for the first time at the hearing. However, there is no contention that Respondent is precluded from litigating this issue because it was not alleged in its matter, and, consequently, I consider this issue, as well as those alleged in the answer, to be properly before me.

by Chesla prior to his discharge should be offset against his backpay.

II. THE ALLEGED OFFER OF REINSTATEMENT

A. *The Evidence*

The backpay specification alleges that no valid offer of reinstatement was made to Chesla and that backpay therefore continued to accrue throughout the period covered by the specification: November 26, 1979 (the day Chesla was discharged), through December 31, 1981. Respondent contends that on July 1, 1980,[5] the second day of the hearing in the unfair labor practice proceeding, Respondent's then counsel, David Morse, made an unconditional offer of reinstatement to Chesla which tolled backpay. In support of this contention, Respondent offered into evidence a portion of the transcript in that proceeding which reads, in pertinent part, as follows:

> MR. MORSE: Before we begin this morning, Your Honor, yesterday we had some discussion off the record about an offer of reinstatement that was made by the respondent to Mr. Chesla. I indicated to you at that time that we would like it placed on the record today.
>
> The reason I did not do it yesterday is that I was uncertain as to the perimeters because of the unique situation we are dealing here with in the form of commissioned salesmen.
>
> At this particular time, we would put on the record the offer of reinstatement of employer [sic] to the discriminatee, Mr. Chesla, that was made yesterday. That would include reinstatement under the terms of the existing pay plan as of November 26, 1979, up through and including the date of the new collective bargaining agreement at which time the reinstatement would be subject to the terms and conditions of—
>
> THE JUDGE (interrupting): If he goes back to work today, he goes back to work under the terms and conditions that exist today.
>
> MR. MORSE: Bargaining agreement, that is right.
>
> As near as I can tell, by looking at the figures that are available from the company records, had Mr. Chesla remained in the employment of respondent, he would have received a draw of $1,200 per month against commissions.
>
> THE JUDGE: You don't have to put that on the record. Just give me a bottom line figure. You don't even have to do that. If you are offering back pay, just tell us.
>
> MR. MORSE: I guess maybe to simplify it, Your Honor, what we would do is be willing to offer back pay and would make available to the Board of the NLRB such records as would be necessary in order to determine what, exactly that would be.
>
> THE JUDGE: You are not prepared to make a lump sum offer at this point?
>
> MR. MORSE: We offered, yesterday, the net effect of the draws that he would have gotten under the old plan and the new plan less what he understood—
>
> THE JUDGE (interrupting): Are you willing to put on the record a lump sum offer?
>
> MR. MORSE: Yes.
>
> THE JUDGE: What is that offer?
>
> MR. MORSE: Per the records that we have, the lump sum taking into consideration the draws that he got at Lakeland [an interim employer], based on the activity of his account and the commissions he would have earned from sales that have come in, we believe he would have netted out, including the Lakeland draw, approximately $4,170 through June 30 of 1980.
>
> THE JUDGE: You make that offer at this time.
>
> MR. MORSE: We make that offer of reinstatement and $4,170.
>
> THE JUDGE: Is that what you are saying?
>
> MR. MORSE: In addition, the offer is there to make available to the Board and to work with the Board's representatives on records that are available to determine exactly to the penny what that amount would have been.
>
> We believe at this time it would have been $4,170.
>
> THE JUDGE: Very well, you have made your record. Let's get on with the cross-examination.

It is undisputed that on the first day of the unfair labor practice hearing, June 30, the parties discussed the possibility of settling the case. Morse testified at the instant hearing that, in the course of the discussions regarding Chesla's earnings while employed by Respondent, the Administrative Law Judge calculated on the basis of Chesla's earnings the previous year that the backpay figure would be $35,000 or $38,000.[6] Morse further testified that, on June 30:

> . . . all the discussions were predicated upon what I would call a walk-away settlement, namely that Mr. Chesla was not interested in coming back to work at Boyer and would decline reinstatement and Boyer would make him full in terms of loss of earnings. We got into some extensive discussions about how to calculate backpay in a situation like this . . . .

According to Morse, after some further conversation with the Administrative Law Judge he said that he would discuss with Philip Maas, Respondent's president, the prospect of making an offer of reinstatement, and that Respondent would prefer to make such an offer on the record. When Morse was asked on cross-examination whether he had expressed opposition to reinstating

[5] All dates in this section of this decision are 1980 unless otherwise indicated.

[6] Morse first testified that the General Counsel took the position that Chesla's earnings for the previous year should be divided by 12 and then multiplied by the number of months he had been out of work, thus arriving at this total. However, in response to another question a few minutes later, Morse ascribed to the Administrative Law Judge this method of calculating the amount of backpay owed.

Chesla during those discussions, Morse first responded that Respondent knew that Chesla had another job and had been advised that he did not want to return to work and that "I think it is obvious any time you have had a disagreement between an employer and employee it is not the best situation for them to get back together under the circumstances." When asked again whether he had expressed to Everett Rotenberry, counsel for the General Counsel in the unfair labor practice proceeding, Respondent's opposition to reinstating Chesla, Morse said, "I don't know whether we expressed an opposition to him coming back to work, we did know that if an offer of reinstatement was made and if Mr. Chesla accepted it, obviously he would come back to work at Boyer." Morse further testified that on the evening of June 30 he suggested to Maas that Respondent offer Chesla reinstatement, that Maas told him to do so, and that Morse advised his client that if Chesla accepted the offer he would be coming back to work for Respondent. Finally, Morse testified that when he made the offer of reinstatement and $4170 backpay on July 1 he intended them as separate elements of the offer and did not intend to condition the offer of reinstatement on the acceptance of any specific backpay figure.

Rotenberry testified at the hearing before me that just before the unfair labor practice hearing opened on June 30 Morse said that Respondent would place an offer of settlement on the record at the close of the General Counsel's case but that Morse did not in fact do so. Rotenberry also testified that during settlement discussions on June 30 Morse said that Respondent did not want to reemploy Chesla and that if reinstatement were required there would be no settlement. According to Rotenberry, he told Morse during a discussion between the two of them on June 30 that there was no need for Respondent to make an offer of reinstatement to Chesla because he did not want to return to Respondent's employ and that the General Counsel would settle for $35,000 in backpay, excluding interest and contributions to the pension and profit-sharing plans. Still according to Rotenberry, Morse replied that Respondent was not prepared to pay that sum, that Chesla owed Respondent about $60,000, and that Respondent would not pay any backpay. At that point the Administrative Law Judge entered the discussions and made several proposals, eventually asking Morse if Respondent would be willing to pay $9,000. Morse replied that Respondent would not pay that amount. Rotenberry further testified that Morse's final offer with regard to backpay on June 30 was about $3900, and that Morse said that Respondent would make records available to the Board to verify that that amount was appropriate.

According to Rotenberry, as a result of the discussions on June 30, when Morse referred on the record on July 1 to an offer of reinstatement, he wondered what Morse was talking about, but when Morse referred to offering $4170 in backpay Rotenberry concluded that Morse was proposing to increase the amount of backpay Respondent was willing to pay by $200. Rotenberry also testified that he considered the offer of reinstatement as being conditioned upon the acceptance of the backpay offer and that Morse was offering Respondent's records to verify the amount of money that Respondent had determined was owed to Chesla.

B. *Analysis and Conclusions*

Respondent argues that Morse's offer on the record was a valid and unconditional offer of reinstatement to Chesla's former position which tolls backpay as of July 1, 1980. According to Respondent, the transcript of the hearing of that date establishes that Morse offered Chesla reinstatement on behalf of Respondent and that Morse made the backpay offer only after he was asked by the Administrative Law Judge to state an amount, and thus the offer of reinstatement cannot be construed as being conditioned upon acceptance of the backpay offer. Respondent further contends that if Rotenberry did not understand that Respondent was offering unconditional reinstatement at that time he should have asked Morse to clarify what he was saying. The General Counsel, however, contends that the statement in the record must be construed in light of the discussions the day before and that, when so construed, Morse's statement on the record did not constitute a valid offer of reinstatement. I agree with the General Counsel.

It is well established that an offer of reinstatement must be wholly unconditional in order to be valid,[7] and it is equally well established that "since Respondent is the wrongdoer responsible for the existence of any uncertainty the uncertainty must be resolved against it."[8] In the instant case, I credit Rotenberry's testimony that on June 30 Morse explicitly stated that Respondent would not settle the case if it were required to offer Chesla reinstatement.[9] Nonetheless, on July 1, Morse referred initially to an offer of reinstatement "that was made" to Chesla, and again to an offer of reinstatement to Chesla "that was made yesterday," and then said, "we make that offer of reinstatement and $4170," even though Morse conceded at the hearing before me that in fact no offer of reinstatement had been previously made to Chesla. Thus, Morse's references to offers that were made or the offer that had been made "yesterday" are at best ambiguous and, consequently, cannot be considered a valid offer of reinstatement.

I further find that Morse's later reference on July 1 to an "offer of reinstatement and $4,170" was also not a valid unconditional offer of reinstatement. It is clear from the findings above with regard to the discussions of June 30 that Respondent was willing to offer reinstatement to Chesla only as part of an overall settlement of the unfair labor practice charges and with the understanding that the offer would be declined. Thereafter, on July 1 Morse did not make it clear that he was offering reinstatement unconditionally with the amount of backpay to be left open.[10] Indeed, Morse explained that the

[7] *Tri-State Truck Service*, 241 NLRB 225 (1979), enf. denied on other grounds 616 F.2d 65 (3d Cir. 1980).

[8] *Avon Convalescent Center*, 219 NLRB 1210, 1213 fn. 17 (1975).

[9] Indeed, Morse did not deny that he made the statements Rotenberry attributed to him, but gave unresponsive answers when questioned on the subject under cross-examination by the General Counsel.

[10] As the Board held in *Consolidated Freightways*, 253 NLRB 988 (1981), a refusal to include an offer of backpay with an offer of reinstate-

Continued

amount Respondent offered was based on Chesla's draw from Respondent less interim earnings, and thus Respondent was not taking into account the commissions Chesla would have earned from sales had he continued to work for Respondent. In these circumstances, Morse's offer to make Respondent's records available was fairly interpreted by Rotenberry as an offer to verify the sum which Respondent had already decided it was willing to pay, not an offer to determine an appropriate formula for ascertaining how much backpay was due and then use the records to calculate the amount pursuant to that formula.

As indicated above, the burden was on Respondent to make a clear and unambiguous offer. Inasmuch as the offer made on the record[11] could reasonably be interpreted as an offer of reinstatement conditioned upon acceptance of the backpay offer, I conclude that Respondent did not meet its burden and that the offer as made did not serve to toll backpay.[12] I therefore find, as alleged in the specification, that the backpay period at issue here was from November 26, 1979, to December 31, 1981.

III. THE FORMULA FOR COMPUTING GROSS BACKPAY

A. *The General Counsel's Formula*

The backpay specification alleges that an appropriate measure of what Chesla would have earned during the backpay period can be obtained by determining the ratio of Chesla's earnings for 1979 to the average of the earnings of three other named salesmen for that year and then multiplying the average earnings of the group in each quarter of the backpay period by that ratio. James Miller, the compliance supervisor who prepared the specification, credibly testified that he considered using other formulas for determining the amount of backpay due to Chesla, but determined that none of those formulas was appropriate, either because the formulas did not consider the special circumstances inherent in the position of commissioned salesmen as opposed to a salaried or hourly employee, because an examination of Respondent's records revealed that the commissioned salesmen did not have a uniform earnings record, or because the formulas did not take into consideration the economic conditions in the industry during the backpay period. Miller further credibly testified that there were no salesmen who sold exclusively on a fleet basis during the entire backpay period and that the three salesmen he determined to comprise the representative group, Darrell Anderson, Dale Smith, and Ralph Ziesmer, were selected because of their length of employment, the nature of their sales, and the fact that they all remained in Respondent's employ throughout the backpay period.

Appendix A to the backpay specification, which sets out Miller's calculations pursuant to this formula and which was stipulated by the parties to be accurate, shows that in 1977 Chesla earned $63,346.36, that the average of the total earnings of Anderson, Smith, and Ziesmer was $23,672.21, and that, accordingly, the ratio of Chesla's earnings to the average of the earnings of the three other salesmen for that year was 2.67 to 1. In 1978 Chesla earned $54,897.80, or 1.61 times the average earnings of the other three salesmen considered, and in 1979 Chesla earned $66,265.37 or 1.51 times the average earnings of the group of $43,819.75.[13] Miller credibly testified that it was obvious from his examination of Respondent's records that Chesla earned substantially more than other commissioned salesmen and that he used the ratio for 1979, which was the lowest ratio between Chesla's earnings and those of the other three salesmen.

B. *Respondent's Formulas*

It is undisputed that sales of trucks severely declined in 1980 and 1981 from 1979 levels, and that much of that decline was in fleet sales. Respondent contends that the General Counsel's formula ignores both the overall decline in truck sales, particularly fleet sales, since 1979, and what Respondent contends is the fact that Chesla was exclusively a fleet salesman. Respondent further contends that various other formulas would provide a more appropriate measure of what Chesla would have earned had he continued as an employee of Respondent throughout the backpay period.

1. Chesla's commissions earned after his discharge from the same customers he serviced while employed by Respondent

Respondent contends that, because each fleet salesman had his own accounts which he serviced and the salesmen were not permitted to make sales to accounts assigned to someone else, Chesla could have continued to service the same customers after his discharge and thus is not entitled to any backpay at all. In support of this contention, Respondent cites Chesla's testimony in the unfair labor practice hearing on July 1, 1980, to the effect that before his discharge he considered leaving Respondent's employ and, in the event he did so, wanted his customers to deal with him in the future rather than with Respondent. Thus, according to Respondent, Chesla could have

ment does not render the latter offer inadequate. However, the question here is not whether Respondent was required to offer backpay at the time it purportedly offered reinstatement but whether the offer of reinstatement was conditioned upon Chesla's acceptance of the amount of backpay Respondent had calculated was due him.

[11] In view of my findings as to what occurred on June 30, I find it unnecessary to determine whether Maas in fact told Morse to make an unconditional offer of reinstatement on July 1 for, even if that conversation occurred as Morse described it, there is no evidence that that intention was communicated to the General Counsel prior to the statement being made on the record on July 1 and, thus, no reason for the General Counsel to believe that Respondent's position had changed from that taken the preceding day that under no circumstances would Respondent be willing to take Chesla back.

[12] I also disagree with Respondent that the General Counsel was obligated to seek clarification of the offer. The burden is on Respondent to make a valid unconditional offer of reinstatement, not on the General Counsel to make sure that Respondent's offer is couched in the proper terms or to clarify an offer which is not. Respondent was represented by counsel, and the General Counsel, in his role as advocate in an unfair labor practice hearing, is not obligated to advise an opposing party, particularly an opposing party represented by counsel, how to achieve that party's desired end.

[13] The calculations for the fourth quarter of 1979 are based on Chesla's actual receipts, and do not take into consideration that he was discharged a month before the end of the year.

made the same sales whether employed by Respondent or not.

2. The commissions earned on Respondent's sales to Chesla's accounts after his discharge

Respondent contends that a second acceptable alternative approach to the formula used in the backpay specification would be to pay Chesla the amount of commissions earned by Respondent's sales to his former accounts after his discharge. In support of this proposed method, Respondent contends that these sales would have been made by Chesla had he remained in Respondent's employ and that there is no evidence that he would have been able to sell any more trucks than were sold by other salesmen employed by Respondent during the backpay period.

3. Commissions on fleet sales made by salesmen in the representative group

As its final contention with respect to the formula used to compute backpay, Respondent argues that, if Chesla's predischarge earnings are to be compared with the earnings of other salesmen during the backpay period, the comparison should be only with the latter's earnings from fleet sales inasmuch as Chesla sold exclusively to fleets. Use of this formula, according to Respondent's computations, results in a ratio of Chesla's earnings to average earnings of the representative group of 3.08. However, since the commissions from fleet sales comprised less than half the average total earnings of the members of the group for all except two of the calendar quarters in the backpay period,[14] that ratio is applied to a lower dollar amount. Consequently, the gross backpay calculated pursuant to Respondent's formula is considerably less than that calculated under the formula set forth in the backpay specification.

C. *Conclusions*

It is clear that the Board is not required to attain mathematical precision in its formula for determining gross backpay. On the contrary, "it is well established that any formula which approximates what discriminatees would have earned if they had not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances . . . ."[15]

As Respondent points out, Chesla testified in the unfair labor practice proceeding that he did not do floor duty, which may be interpreted as meaning that he did not make himself available for retail sales, and that he preferred not to do floor duty or to sell used trucks, and, thus, according to Respondent, only a backpay formula which is based solely on fleet sales by either Chesla or other salesmen can be considered appropriate. However, it is undisputed that retail and used truck sales are more profitable for Respondent than fleet sales. It is also undisputed that, in order to provide salesmen with an incentive for making retail and used truck sales, Respondent in late 1979 and thereafter sought to and eventually did reduce the rate of commission on fleet truck sales as compared to sales to nonfleet customers. Notwithstanding this change in the commission rate for fleet sales, all of Respondent's formulas are based on the assumption, totally without support in this record, that Chesla would have continued to sell only to fleet customers even in the face of considerably reduced earnings from such sales. In addition, as the General Counsel asserts, Respondent's formulas ignore Chesla's individual drive and initiative which, presumably, made him one of Respondent's outstanding salesmen in the first place, and also ignore the questions of what fleet sales might have been made by Respondent had Chesla continued to work there. As the General Counsel points out, the ratio chosen for computing what Chesla would have earned during the backpay period in comparison to the earnings of the other three salesmen during that period was the lowest of those available for the years 1977, 1978, and 1979. In addition, the General Counsel's formula takes into account the fact that Respondent's sales declined, for the ratio of Chesla's earnings to the average earnings of the other salesmen is applied to their lower earnings during the backpay period. In light of these considerations, and as the formula utilized in the backpay specification has been found to be appropriate in other, similar cases,[16] I conclude that the General Counsel has established that the use of such a formula is appropriate in the instant case and that Respondent has not demonstrated that the formulas it proposes would result in a more accurate approximation of what Chesla would have earned had he continued to work for Respondent during the backpay period.

IV. BACKPAY FOR THE FOURTH QUARTER OF 1979

It is undisputed that Respondent considers a truck sold and the salesman's commission earned when the customer pays for the truck, and that commissions are paid the second Tuesday of the month following consummation of the sale. Thus, for example, if a customer pays for a truck on January 1 the salesman receives his commission for that sale on the second Tuesday in February. Respondent contends that Chesla was paid in December for all commissions earned by him in November and that, consequently, he was paid all that was owed him for the fourth quarter of 1979 and no backpay should be awarded for that quarter. It appears that the figures in the specification and the appendix for 1977, 1978, and through November 1979 all refer to amounts received by Chesla or the other salesmen rather than amounts earned but not yet paid. Thus, for example, if a truck sold by Ziesmer was paid for by the customer in December 1979, Ziesmer's commission on that sale would be payable to him in January 1980 and thus not be included in the calculations for 1979. In these circumstances, there is merit, at least in part, to Respondent's argument that the

[14] In 1979 fleet commissions were 49 percent of the average total earnings of the group of three salesmen; in the third quarter of 1980 fleet sales were 54 percent of the total average earnings and in the fourth quarter of 1980 fleet sales commissions comprised 46 percent of the total average earnings of that group; but in the other calendar quarters of the backpay period commissions on fleet sales were between 23 and 38 percent of the total earnings of the group.

[15] *Am-Del-Co.*, 234 NLRB 1040, 1042 (1978).

[16] See, e.g., *Folk Chevrolet*, 176 NLRB 277, 279–280 (1969).

moneys owed to Chesla in 1979 were paid to him, because any trucks that he might have sold during the last week of November or during the month of December would not have been paid for until sometime in 1980, and, thus, Chesla would not have received any commissions for those sales in 1979.[17]

The General Counsel argues that the backpay specification, which calls for a payment in December 1979 in lieu of payment for the last month of the backpay period, best measures Respondent's liability. However, this formula does not take into account the fact that truck sales declined in 1980 and 1981 and, consequently, that in all probability the last month of the backpay period was one in which Chesla would have earned less than he earned in November 1979. In addition, if commissions from sales Chesla would have made during the period between November 26 and the end of the year are treated as received during that period, interest thereon would run from an earlier and inappropriate date. Accordingly, I find that Respondent has paid Chesla the commissions he earned in November 1979 and that Chesla would not have received any other commissions in December of that year. However, since a backpay period is based on how long an employee would have worked as opposed to how long he would have received payment for his work, it is clear that Chesla must ultimately be paid commissions which he would have earned in the last month of the backpay period and would have received the following month.

V. CHESLA'S ENTITLEMENT TO VARIOUS FRINGE BENEFITS[18]

A. *The Car and Gasoline Allowances*

The specification alleges that Chesla is entitled to a gasoline allowance of $50 per month for the entire backpay period and a car allowance of $200 per month for the last month of 1979 and the first quarter of 1980 and $150 per month for the rest of the backpay period. Respondent admits that it has a policy of paying its salesmen car and gasoline allowances, but asserts that the purpose of these allowances was to reimburse the salesmen for expenses incurred on the job. Thus, according to Respondent, inasmuch as after Chesla was discharged he had no expenses, he was not entitled to these benefits.

In support of this contention, Maas testified that the car allowance was paid to salesmen for the use of their own cars and was intended to reimburse them for the cost of depreciation, service, and oil, and that Respondent either provided the salesmen with a vehicle or gave them the allowance, regardless of how much they used the car in any given month. Maas further testified that the gasoline allowance was provided to reimburse the salesmen for gasoline expenditures and that the salesmen were required to submit receipts up to a maximum of $50 in order to obtain the reimbursement; if a salesman spent less than $50 in a given month for gasoline he was reimbursed for the amount he actually spent.

The Board has held, with court approval, that demonstrator automobiles are compensable items in backpay proceedings, where the cars are furnished as a perquisite of employment and not as a selling tool.[19]

In the instant case, although Maas testified that the purpose of the car and gasoline allowances was to reimburse the salesmen for the cost of using their own cars for business purposes, there was apparently no restriction on the salesmen that they use their cars or buy gasoline only for business purposes, nor is there any evidence as to how much Chesla or other salesmen used their cars in the course of their work. Maas conceded that salesmen were not required to submit mileage claims in order to receive the gasoline allowance, but testified that the sales manager monitored the salesmen's calls; nonetheless, there is no evidence that Respondent ever undertook to ascertain that a salesman used all the gasoline for which he claimed reimbursement in making sales calls. In these circumstances, I find that both the car and the gasoline allowances were perquisites of the salesmen's employment. Accordingly, I conclude that these allowances were benefits which Chesla would have continued to receive had he remained in Respondent's employ and were properly included in the backpay specification.[20]

B. *Pension Contributions*

It appears that Respondent contributed an amount equal to 2 percent of a salesman's commissions to the National Automobile Dealers and Associates Retirement Trust Pension and Profit Sharing Plan. Having found that the adjusted average gross backpay for the years 1980 and 1981 is as set forth in the backpay specification, I shall recommend that Respondent be ordered to pay the amounts set forth in the specification, $1069 in 1980 and $1068 in 1981, as pension contributions for those years. As I have found above that Chesla is not owed any backpay for the fourth quarter of 1979, I shall recommend that Respondent not be required to make any pension contribution for that quarter. However, as noted above with respect to gross backpay, ultimately Respondent will be required to make pension contributions based on commissions Chesla would have received after the end of the backpay period for sales he would have made during that period.

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[17] The General Counsel contends that Respondent's theory fails to take into account that Chesla was discharged prior to the end of November 1979, and thus fails to award him any backpay for commissions he would have earned the remainder of that month. However, since it appears that there was a substantial timelag between when an order for a truck was placed and when the truck was paid for, it is unlikely that any sales Chesla could have made in the last week of November would have resulted in commissions paid in December.

[18] In addition to the fringe benefits discussed below, it is undisputed that Chesla is entitled to $92 as reimbursement for health insurance premiums.

[19] *Folk Chevrolet*, supra at 278. See also *DeLorean Cadillac*, 231 NLRB 329, 333 (1977), enfd. in pertinent part 614 F.2d 554 (6th Cir. 1980); *Nickey Chevrolet Sales*, 195 NLRB 395 (1972), enfd. 493 F.2d 103 (7th Cir. 1974).

[20] I recognize that the salesmen did not receive the full $50-per-month gasoline allowance in those months in which they did not present receipts totaling the full $50. However, Respondent neither contends nor adduces evidence that if Chesla had remained in its employ he would have received less than the $50 each month and I therefore conclude that the backpay specification appropriately includes the maximum gasoline allowance.

C. *The Profit-Sharing Contribution*

The backpay specification alleges that Chesla is entitled to profit-sharing contributions of an unknown amount. Respondent does not contend that profit-sharing contributions should not be included in the backpay owed to Chesla, but contends that he received the contributions owed to him for the year 1979, that no profit-sharing contributions were made on behalf of any employee in 1980, and that for 1981 Chesla should be paid either $85.27 (based on Respondent's formula for gross backpay based on sales to Chesla's accounts subsequent to his discharge), or $453 (in accord with Respondent's alternate formula for gross backpay based on fleet sales by other salesmen).[21]

There is evidence that the profit-sharing contribution is based on the proportion of commissions paid to an individual salesman as compared to Respondent's total payroll. Inasmuch as the gross backpay for 1981 as alleged in the backpay specification and as I have found appropriate is $53,376, a somewhat larger amount than the $31,330 on which Respondent's calculation of $453 for profit sharing is based, it appears that in fact the amount of profit-sharing contribution which Chesla would have received is greater than that alleged in Respondent's alternate computation. However, as the backpay specification does not allege a specific amount, and as the General Counsel has stated in his brief that the profit-sharing amount of $453 is appropriate, I will recommend that that amount be paid to Chesla as the profit-sharing contribution.[22]

VI. DEDUCTIONS FROM GROSS BACKPAY

A. *Interim Earnings*

It is undisputed that Respondent paid Chesla a total of $598.12 during the first quarter of 1980 and $252.69 during the second quarter of that year and that these amounts were commissions on orders taken by Chesla before his discharge. Respondent contends that these sums must be considered interim earnings and deducted from the gross backpay due him. In support of this contention Respondent points out that, as already discussed above, a commission is not earned until the truck is paid for and, thus, these commissions were earned during the backpay period. I agree.

As indicated by the discussion above with regard to whether any backpay is due to Chesla for the fourth quarter of 1979, there is some confusion generated by the timelag between the date a salesman takes an order and the date he receives his commission. As also indicated above, a commission is earned not on the date the order is taken but on the date the truck is paid for, and the commission is paid to the salesman the following month. Consequently, according to Respondent, because the commission is earned when the truck is paid for, Chesla continued to earn money from Respondent even after his discharge. I have already found that the calculations in the backpay specification are based on amounts received by Chesla before his discharge and by the salesmen in the representative group both before and after Chesla was terminated. Thus, it is appropriate to consider commissions he received from Respondent following his discharge as interim earnings, for both the gross backpay figures and those for interim earnings as alleged in the backpay specification are not based on work performed during the backpay period, but, rather, on amounts received during that period. I will therefore add to Chesla's interim earnings the sums he received from Respondent during the backpay period.

B. *Amounts Owed by Chesla to Respondent*

Respondent introduced into evidence a document which lists various sums known as "chargebacks" which would have been offset against Chesla's commissions had he remained in Respondent's employ.[23] It is undisputed that these amounts would have been deducted from Chesla's commissions had he remained in Respondent's employ. However, as the General Counsel points out in his brief, Maas conceded that chargebacks to the accounts of the salesmen in the representative group (with whose average earnings Chesla's were compared) were taken into account in calculating their earnings as set forth in the appendix to the backpay specification. Consequently, as the General Counsel asserts, the average used to calculate what Chesla would have received takes into account the existence of chargebacks. Thus, to deduct these amounts from Chesla's gross backpay would be in effect to count these chargebacks against him twice: once in computing the average and again by deducting his own chargebacks from his gross backpay. Accordingly, I will not recommend that the chargebacks be deducted from Chesla's gross backpay.

VII. SUMMARY AND CONCLUSIONS

In view of the foregoing, I find that Chesla is entitled to the following net backpay, plus interest:

Calendar Quarter	*Gross Backpay*	*Net Interim Earnings*	*Net Backpay*
1980–I	$ 8,306	$ 598	$ 7,708
1980–II	9,529	2,493	7,036
1980–III	16,563	2,529	14,034
1980–IV	19,062	2,575	16,487
1981–I	8,871	3,117	5,754
1981–II	14,838	3,865	10,973
1981–III	13,866	8,661	5,205
1981–IV	15,801	5,295	10,506
	$106,836	$29,133	$77,703

[21] The amount of gross backpay Respondent alleges is due to Chesla for 1981 according to each of its formulas is $8366 and $31,330, respectively. The General Counsel contends in his brief that Chesla is owed profit-sharing contributions of $453.

[22] Apparently, there is no dispute that the profit-sharing contribution to be made on Chesla's behalf for 1979 was paid to him in February or March of that year and that in fact Respondent made no such contributions in 1980. Consequently, the only amount at issue is the contribution which would have been made to Chesla's account in 1981.

[23] Specifically, Respondent contends that the following amounts should be deducted from gross backpay: $641.79 for draw exceeding commissions Chesla earned in December 1979; $775.46 resulting from the sale of trade-ins at a loss; $37.80 as Chesla's share of a shortage on a payment by a customer for additional charges on trucks Chesla sold; $480 on a chargeback of an incentive discount from Ford Motor Company; $75.73 for equipment which cost more than Chesla quoted to a customer; and $1,235.05 as Chesla's share of expenses on a car provided to a buyer employed by one of his customers.

In addition, Chesla is entitled to a car allowance of $200 for the fourth quarter of 1979 and for each of the first 3 months of 1980 and $150 for each of the remaining 9 months of that year and for each of the 12 months of 1981, or a total of $3,950; $50 gasoline allowance for each of the 25 months of the backpay period or a total of $1250; $92 in health insurance premium reimbursement; pension contributions of $1069 for 1980 and $1,068 for 1981, or a total of $2137; and profit-sharing contributions in the amount of $453. Thus, the grand total is $85,585 plus interest.[24]

On these findings and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Boyer Ford Trucks, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall satisfy its obligation to make whole Joseph E. Chesla through December 31, 1981, by the payment of the amount of $85,585 as net backpay. The foregoing amount shall be paid plus interest thereon accrued to the date of payment, computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[26]

[24] In addition, the parties stipulated that Chesla earned commissions totaling $1,218.43 which became due to him during the backpay period and which have not been paid to him by Respondent. In accordance with my findings above with respect to amounts which were paid to Chesla during the backpay period, this sum may be considered interim earnings when it is eventually paid to him.

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[26] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962), minus any tax withholding required by Federal or state laws.